



NEDLAC LABOUR LAW REFORM

Regulating remote and hybrid working arrangements: considerations for a Code of Good Practice for Remote Work

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PART A. INTRODUCTION, OBJECTIVES AND CONTEXT

1. The focus of this paper is the **adequacy of the labour and social security law framework** in response to **remote work** in the South African labour market.¹ While remote work has been in use for several decades, the unprecedented Covid-19 pandemic precipitated the rapid adoption of remote work across organisations. Our aim is to examine whether the existing labour statutes adequately protect workers in **remote work arrangements** and, if not, to propose amendments to the current framework.
2. Many employees perform their work away from an employer's premises (traditional workplace) with the aid of digital technology, in a mode of work known as **remote work** or **telework**.² More specifically, the International Labour Organization (ILO) and Eurofound define remote work as 'the use of information and communications technology (ICT), such as smartphones, tablets, laptops and/or desktop computers for work that is performed outside the employer's premises'.³ Perry and Hunter refer to remote work as 'performing work at a location other than one's primary office',⁴ as a form of **flexible working arrangements**. Examples of remote locations are the homes of employees, coworking spaces, coffee cafes and local libraries, among others. Remote working could be on a full-time (or part-time) remote basis or a flexible (hybrid) work arrangement where work is partially remote. An important characteristic of this kind of work is that it entails the **use of digital technology** to keep employees and the employer in contact with

¹ See in this regard the following publications with suggestions for clarifying and regulating remote work in South Africa, which have informed the proposals in this paper: Rammila D '[Teleworking in South Africa: Laws and Challenges in an Unequal Society](#)' (2023); Prof. Letlhokwa George Mpedi, [The way we work is evolving quickly and legislation must evolve accordingly](#) and [Beware the ethical and legal considerations of using wearables in the workplace](#) (2023) Daily Maverick; Marthinus van Staden [The digital ties that bind – South Africans need the right to disconnect and slip the work leash](#) (2021) Daily Maverick; and Sibanda OS '[Why remote employees should have the right to disconnect after working hours](#)' Daily Maverick 5 February 2023; and JA James, 'Remote working and labour legislation in South Africa', LLM research paper, University of the Western Cape (December 2022).

² Different and sometimes overlapping definitions are used interchangeably to refer to work arrangements where workers work from a distance and/or work from home. In the United States and India, the term '**telecommuting**' is used to refer to work arrangements where workers use ICT to work not only from home but practically any location. In Europe, the terms 'telework/ICT-mobile' is used to refer to the same phenomenon. More recently, the International Conference of Labour Statisticians describe remote work as "situations where the work is fully or partly carried out on an alternative worksite other than the default place of work". **Telework** on the other hand, is said to be remote work but personal electronic devices such as computer, tablet or telephone is used to perform work. At the same time, authors have used the term '**working from home**' to refer to telecommuting work arrangements. See [Remote work, telework, work at home and home-based work 21st International Conference of Labour Statisticians](#) (October 2023), Geneva ; [COVID-19: Guidance for labour statistics data collection: Defining and measuring remote work, telework, work at home and home-based work ILO technical note](#) (2020); ["Towards Safe, Healthy and Declared Work in Ukraine"](#) (July, 2020) [Telework Online training series International and EU Labour Standards Background paper](#); Eurofound and the International Labour Office *Working anytime, anywhere: The effects on the world of work* Publications Office of the European Union, Luxembourg, and the International Labour Office, Geneva; Bloom N & Liang J et al 'Does Working from Home Work? Evidence from a Chinese Experiment' (2015) 130 *The Quarterly Journal of Economics* 165.

³ Eurofound and the International Labour Office *Working anytime, anywhere: The effects on the world of work* Publications Office of the European Union, Luxembourg, and the International Labour Office, Geneva (2017) 1.

⁴ Perry S & Hunter E 'Out of Office: What Type of Employee is Best Suited for Remote Work?' (2019) 12 Keller Center Research Report 1.

each other.⁵ Remote workers are typically in an **employment relationship**, but they work outside the employer's premises or designated workplace. This **differs from remote platform workers** who also provide services remotely but are likely to be (mis)classified as independent contractors and use online platforms to access other organisations or individuals to perform tasks or provide specific services in exchange for payment.⁶

3. Remote work offers **flexibility** in how work is performed, and the potential for **inclusivity** and work life balance, particularly for women (who overwhelmingly shoulder the burden of domestic responsibilities) and persons with disabilities to participate in the world of work.⁷ Remote work also contributes to **environmental sustainability**⁸ and can improve efficiency. However, remote work also raises challenges and concerns for the well-being of workers.
4. Depending on the personal and professional characteristics and circumstances of individual employees, remote work can impact on the **quality of employment conditions**,⁹ and **blur the line between work and private time**. Workloads may increase, and employees may take on **financial burdens for work tools** (such as payment of internet connection and other utilities). Remote work can amplify the exposure of employees to pervasive forms of surveillance and control by the employer. Uncertainty regarding **health and safety protections**, and **ergonomic and psychosocial risks** are a concern. In this regard, **isolation** is a significant challenge of remote work and could aggravate psychosocial risks,¹⁰ including exposure to **violence and harassment** at work, particularly for women employees. Remote work **decentralises the traditional employment structure**, increasing the **externalisation of employment** and the likelihood of misclassification as an independent contractor. Employees who work remotely are at risk of becoming **invisible** and being overlooked in promotion processes¹¹ and in the application of

⁵ Ramguttu Wong A [An Assessment of the Legal Teleworking Framework in the Republic of Mauritius](#) ILAW Network (2023).

⁶ **Remote platform workers** are often classified as freelancers or independent contractors, which affects their access to social benefits and job security, yet many have little control over their work hours and schedules, and are required to follow the platform's rules, failing which their ratings and potential access to work may be negatively impacted. **Platform algorithms**, under the control of hiring entities, measure the performance of remote platform workers and influence access to work opportunities. A regulatory framework should be in place to clarify the employment status of remote platform workers and to protect the right to organise and access to collective bargaining for platform, to the provide for fair termination processes, and to regulate wages and working hours, and access to social security benefits. Contouris N *et al* 'The future of remote work' (2023) 41. On the regulation of platform work, see the NEDLAC law reform paper *Workers who are (not) employees: promoting decent work and access to labour standards and social protection*.

⁷ [Teleworking during the COVID-19 pandemic and beyond A practical guide](#) Geneva: International Labour Office, July 2020 18; Gaulfield, Sean. 'She Works Hard for the Money Wherever She Is: The Need to Abandon the Physical Presence Presumption in Telecommunication Cases Following EEOC v. Ford.' *Vill. L. Rev.* 61 (2016): 262.

⁸ For example, research shows because of the daily commute that was all but cancelled during the 2020 lockdown, global CO₂ emissions reduced by 17%. Le Quéré C, Jackson RB, Jones MW *et al* 'Temporary reduction in daily global CO₂ emissions during the COVID-19 forced confinement' (2020) 10 *Nat. Clim. Chang.* 647–653.

⁹ Lodovici E *et al* [The impact of teleworking and digital work on workers and society](#) (2021).

¹⁰ See, Ha, N. "Workplace isolation in the growth trend of remote working: a literature review." *Rev economic Bus Stud* 14.1 (2021): 97-113; Killgore, W.D.S.; Cloonan, S.A.; Taylor, E.C.; Dailey, N.S. Loneliness: A signature mental health concern in the era of COVID-19. *Psychiatry Res.* **2020**, 290,

¹¹ Guyot, Katherine, and Isabel V. Sawhill, '[Telecommuting will likely continue long after the pandemic](#)' (2020).

employment policies and practices, for example access to benefits such as training. Matters for consideration in the context of **remote work** include –

- a) Trade union (collective) representation
- b) Regulation of hours of work
- c) Privacy and the right to disconnect
- d) Occupational health and safety
- e) Compensation for occupational injuries and diseases.

PART B. OVERVIEW OF PROTECTION AND GAPS IN RELATION TO REMOTE WORK

(1.) Implications for collective bargaining, work arrangements, surveillance & privacy

5. The Labour Relations Act, 1995 (LRA) gives effect to the constitutional right to fair labour practices among other objectives and provides for individual and collective labour rights. However, its protective scope is limited to **employees** as defined in section 213, which excludes independent contractors. Hence, a worker who has entered any other contract rather than an employment contract, may be excluded from protection under the LRA. The LRA will apply to remote work arrangements if the worker falls within the definition of an employee in terms of section 213. However, the exclusion of independent contractors provides an opportunity for employers to put legal distance between themselves and remote employees, particularly as the **characteristics of remote work** (similar to the context of **platform work**), such as, working **outside the premises of the employer** and the **flexibility** afforded to employees **to determine how and when work is done**, could lead to the **externalisation of employment** by converting arrangements for remote work to independent contracting. Within this context, the **dominant impression test**, the **statutory presumption** of who is an employee in **section 200A** of the LRA and the **Code of Good Practice: Who is an Employee**, are relevant in determining the existence of an employment relationship in remote work arrangements.¹² Moreover, where a remote employee is not a full-time employee, chapter IX of the LRA, as well as the provisions of the Employment Equity Act, requires **equality of treatment**.
6. Changes to the terms and conditions of employment should be based on consensus; recognising that employees have certain protections / remedies in the event of a **unilateral change of terms and conditions**. However, an employer can **unilaterally vary working arrangements** which could possibly include requirements for remote work without the consensus of employees.¹³ Any uncertainty in this regard should be resolved by requiring consultation on matters related to remote work. Important considerations in this regard are the risks of remote work and the potential impact on employment and on employees, including employees' well-being. As mentioned, **isolation** is a risk of **remote work** which can result in psychological challenges, including depression. Moreover, the circumstances of some workers, particularly women, such

¹² The **dominant impression test** was developed by the courts to determine whether a worker is an employee or an independent contractor (see para 27. of the [Code of Good Practice, Who is an Employee](#)), and requires evaluation of all aspects of the contract and realities of the relationship to determine whether an employment relationship exists. We have proposed revision to the Code to ensure that the relevant factors take account of new forms of work, in particular platform work, but which would also apply in the context of remote work. See the NEDLAC law reform paper *Workers who are (not) employees: promoting decent work and access to labour standards and social protection* and in particular Annexure A.

¹³ Moreover, the principle of voluntarism means that employers are not under a duty to bargain changes to working arrangements.

as **family responsibilities** or **domestic violence** could have implications for workers and their productivity. In addition, the lack of clarity on who bears the **burden of work-related costs** in the context of remote can place a burden on employees.¹⁴ These are matters that we propose should be clarified in a Code of Good Practice for Remote Work, and that arrangements for remote work should be based on consensus or collective bargaining between the parties.¹⁵

7. Moreover, there should be clarity on the financial implications of remote work. Although there is no express legal obligation on the employer to provide the tools of the trade,¹⁶ employers should ensure that remote workers have the necessary equipment to be as productive as they would be at the office, and that they have access to the technology that they would have had at the employer's premises.¹⁷ Employers may therefore need to determine the remote worker's technological needs, resources and skills in working with the relevant technology, and revise policies on whether workers can use their own devices instead of the employer's ICT equipment, and should include in policies requirements for reimbursements of employees to ensure that they are supported with the necessary equipment, and should indicate whether a remote worker is permitted to take equipment from the workplace for use at home.¹⁸ Employers may also provide training to remote workers and ensure they know how to use the relevant technology and how to access the technical support personnel if information is required.¹⁹
8. Issues related to cost, including equipment and connectivity costs, should be clarified in remote working arrangements, and employees should be compensated for costs associated with their work, including data costs, electricity, and mobile phone service.²⁰ Employers should inform

¹⁴ This could include direct costs associated with remote work, but in addition the possibility of paying 'double tax' when a remote worker is based in a country other than the country in which the premises of the employer are situated. Clarity should be provided and in addition tax measures could be considered if necessary.

Messenger J *et al* 'Teleworking during the COVID-19 pandemic and beyond: A Practical Guide' (2020) 23.

¹⁵ For example, the **Angola teleworking legislation (Presidential Decree No. 52/22)** requires that remote work be established through a **written agreement** between the employer and employee; and related to this, in some countries' workers have the **right to request remote work** which the employer may accept or deny. See for example, the Australian Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (s. 65A **Responding to requests for flexible working arrangements**) which sets out the prescribed steps that an employer must take before the request for flexible work is denied, which establishes the right to request remote work as a form of flexible working arrangements which the employer may accept or deny.

¹⁶ Section 83A of the BCEA identifies the provision of tools of trade or work equipment by an employer as one of the factors to determine whether a worker is an employee. For remote employees, **mobile phones, computers, stationery, vehicles, work chair and desk, and internet connection** are necessary for the performance of work. In this context, leaving the responsibility for the costs of providing and maintaining work tools and other work associated costs vague could aggravate the inherent inequality in the employment relationship and create legal distance between an employer and employee. Furthermore, it increases the possibility for remote employees to be reclassified as independent contractors. See Gabel, Joan TA, and Nancy Mansfield. 'On the increasing presence of remote employees: an analysis of the internet's impact on employment law as it relates to teleworkers' *U. Ill. JL Tech. & Pol'y* (2001): 233; Lord, Phil. 'The social perils and promise of remote work' (2020).

¹⁷ Messenger J *et al* 'Teleworking during the COVID-19 pandemic and beyond: A Practical Guide' (2020) 9.

¹⁸ Messenger J *et al* 'Teleworking during the COVID-19 pandemic and beyond: A Practical Guide' (2020) 9.

¹⁹ Messenger J *et al* 'Teleworking during the COVID-19 pandemic and beyond: A Practical Guide' (2020) 9.

²⁰ Contouris N *et al* 'The future of remote work' (2023) 133.

workers of any national allowances or tax benefits associated with remote work,²¹ and any other forms of financial assistance that may be applicable.²²

9. The broader implications of remote work (and platform work more generally) on **freedom of association** should also be considered. In terms of the LRA, **collective bargaining** is underpinned by majoritarianism, while minority trade unions have limited collective bargaining rights. Section 11, read with sections 12-16 of the LRA, grants organisational rights to trade unions that meet the **representation threshold**.²³ **Freedom of association and collective bargaining rights are applicable to remote workers who are employees within the scope of section 213 of the LRA, however the framework for effective collective bargaining (envisaging collective agreements and their extension) centres around the notion of a workplace, which requires consideration in the context of remote work (and other forms of work performed remotely, such as platform work.)**
10. The **workplace** is defined in section 213 of the LRA as ‘the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.’ In other words, ‘**workplace**’ envisages the place where employees work collectively in a specific location. This was affirmed by Cameron J in *AMCU v Chamber of Mines SA*,²⁴ where the court expressed the view that a workplace is ‘not the place where any single employee works – like that individual’s workshop or assembly line or field or desk or office. It is where ‘the employees of an employer’, collectively, work. The statute approaches the concept from the point of view of those employees as a collectivity. This accords with the role the term ‘workplace’ plays in the LRA. This sees workers as a collectivity, rather than as isolated individuals. And that in turn squares with the statute’s objects. The promotion of orderly bargaining by workers, collectively, is one of the statute’s express primary objects. That the focus of the definition of ‘workplace’ is on workers as a collectivity rather than as separate individuals fits.’²⁵ In addition, the Constitutional Court also observes the ‘relative immateriality of location’ in the statutory definition, and that ‘location is not primary: functional

²¹ Contouris N *et al* ‘The future of remote work’ (2023) 133.

²² Messenger J *et al* ‘Teleworking during the COVID-19 pandemic and beyond: A Practical Guide’ (2020) 22. For example, subsidies for equipment or training to support remote work.

²³ The rights include the right of access to the workplace; the right to have union subscription and levies deducted; the right to elect trade union representatives; the right to leave for trade union activities, and the right to disclosure of information. Moreover, trade unions are empowered to conclude collective bargaining agreements with employers to regulate matters that are of mutual interest to the parties. These agreements are binding on members and non-members who fall within the scope of the agreement. In terms of section 23 of the LRA, collective agreement may bind the parties who concluded the agreement; members of such parties to the extent the agreement applies to them; members of union parties and employers’ organisation parties; employees who are not members of the union party (if they are identified in the agreement, the agreements says it binds them and the union party has the majority in the relevant workplace). Section 199 prohibits employers from concluding an employment contract which disregards or waives the provisions of and/or allows treatment of or extends benefits less favourable than that found in any applicable collective agreement. Section 64 grants employees the right to strike.

²⁴ (CCT87/16) [2017] ZACC 3.

²⁵ At para 25.

organisation is.²⁶ This relates to the 'organisational methodology and practicalities'²⁷ of an employer, which places the emphasis on the **operational aspects of work**.²⁸

11. The definition of a workplace and the idea of the workplace as the place of functional organisation, coupled with the organising principle of majoritarianism has implications for collective bargaining and freedom of association, particularly in the context of the increasingly digitalised world of work and complex externalised work and logistical arrangements. Consider for example the following questions if Uber drivers (or other remote platform workers) are classified as employees: how would the workplace be determined; how would the principle of majoritarianism apply; how would a trade union determine that it is sufficiently representative?²⁹ Consideration should be given to the legal framework for organising and collective bargaining and how the regulatory framework can be improved to give effect to core labour standards in this regard.³⁰
12. **The right to privacy** is also implicated by remote work, particularly in the context of **monitoring and surveillance systems** implemented to measure performance of work by employees. An implied term in the employment contract is that an employee will perform their duties with **due skill and care**, and the failure to meet an employer's attainable and reasonable performance standard may justify dismissal in terms of section 188(1)(a). However, this dismissal must be substantively and procedurally fair. To establish fairness, the employer needs to show that the employee was **not meeting reasonable performance standards**; that the employee was aware of the expectation to meet the standard; a fair opportunity to meet the required standard was given, and, dismissal was an appropriate sanction; and, in terms of procedural fairness, an employer is expected to evaluate the employee and to provide adequate instruction, training, and a reasonable time to improve.
13. In traditional employment settings, employers typically use time and attendance systems and direct observation to monitor employee performance³¹ to determine whether employees meet the required performance standards. Relevant assistance, training, and counselling might be provided to facilitate employees' productivity.³² Direct observation also provides an opportunity

²⁶ At para 25.

²⁷ At para 31.

²⁸ In other words, the place of **operational control**: finance and production planning; 'financial management; human resources; IT systems and procurement'. Khumalo, Bongani. "Extension of collective agreements in terms of section 23 (1)(d) of the LRA and the "knock on effect" on the right to strike: AMCU v Chamber of Mines of South Africa CCT87/16 [2017]." *De Jure Law Journal* 51.2 (2018): 318-338. Consider also the 'virtual' spaces where work is performed, and the collective element of this in virtual workplaces such as Microsoft Teams and Zoom.

²⁹ An example in the context of a locally based employer, is the sixty60 delivery drivers (see NEDLAC paper on *Workers who are (not) employees*) – one argument could be, assuming that the operational aspects of the sixty60 delivery drivers are centralised at the RTT Group Head Office (located at ACSA Park in Boksburg), that there is one workplace for Pingo drivers; on the other hand, depending on arrangements, it could be argued that the operational aspects are decentralised to each store that utilises Pingo drivers. The question that arises is the extent to which the **LRA collective bargaining framework** and its current mechanisms for promoting collective bargaining are 'fit for purpose' in the context of remote work and platform work, and in terms of working arrangements in the world of work more generally.

³⁰ See also NEDLAC paper on *Workers who are (not) employees* in this regard.

³¹ Seopros 'How to Monitor Employees Time and Attendance' available at How to Monitor Employees Time and Attendance ? PayDay.

³² Collier *et al Labour Law in South Africa: Context and Principles* Oxford University Press (2018) p. 233.

to identify burnout, emotional exhaustion and minimise staff turnover.³³ However, direct observation may not be easily implemented in a remote working arrangement.³⁴ As a result, many employers monitor remote employees through tracking internet activity, taking screenshots, tracking keystrokes, and GPS tracking, amongst others.³⁵ Constant electronic monitoring has been shown to increase psychological and physical health problems suffered by remote employees, ultimately worsening their performances,³⁶ and it erodes trust in the employment relationship.³⁷ Moreover, **monitoring/surveillance has implications for the right to privacy of employees and their families**, as monitoring increasingly extends into private homes.

14. The right of privacy is guaranteed in section 14 of the Constitution,³⁸ however the right is not absolute,³⁹ and the various regulatory systems⁴⁰ that both protect and impact on privacy and which seek to balance the conflicting interests between an employer's legitimate business interests and assets, and an employee's reasonable expectation of the right to privacy of communications needs to be clarified,⁴¹ specifically in the context of remote work, but also more broadly in the context of monitoring and surveillance of platform workers.
15. Workers and trade unions should be made aware of the use of monitoring tools. There should be consultation and clarification with remote workers and trade unions to ensure that all parties are aware of the rights and responsibilities of the remote worker before monitoring software and other surveillance methods are implemented.⁴²

³³ Meinert D '[How to Prevent Employee Burnout](#)' (2017).

³⁴ Bhave, Devasheesh P. "The invisible eye? Electronic performance monitoring and employee job performance." *Personnel psychology* 67.3 (2014): 3.

³⁵ Trivedi, Sandeep, and Nikhil Patel. "Virtual employee monitoring: A review on tools, opportunities, challenges, and decision factors." *Empirical Quests for Management Essences* 1.1 (2021): 86-99; Ball, Kirstie. "Electronic monitoring and surveillance in the workplace." *European Commission Joint Research Centre* (2021).

³⁶ Jeske D 'Remote workers' experiences with electronic monitoring during Covid-19: implications and recommendations' (2022) 15 *International Journal of Workplace Health and Management* 397.

³⁷ Blackman R [How to Monitor Your Employees – While Respecting Their Privacy](#) (2020).

³⁸ Which includes 'the right not to have their person or home searched, their property searched, their possessions seized, or the **privacy of their communications** infringed.'

³⁹ The extent to which remote work blurs the public and the private divide is brought into focus when considering the *Bernstein v Bester* privacy principle that 'Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.' *Bernstein and Others v Bester NO and Others Z 1996 (4) BCLR 449 para 67.*

⁴⁰ Including the Protection of Personal Information Act 4 of 2013 (POPIA) which guarantees the right to privacy of data subjects; and the Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002 (RICA). For example, s 6 of RICA regulates the interception of indirect (ie. a text or data message) communications of persons in connection with the objectives of carrying on of a business, which permits monitoring and the keeping of records of indirect communications, inter alia, to establish the existence of facts, and requires reasonable efforts in advance to inform a person that communications will be intercepted.

⁴¹ For example, clarifying whether evaluating the performance of remote employees via digital monitoring/surveillance falls within the scope of the RICA 'business communications', eg for establishing the existence of facts, investigating unauthorised use of communication systems, or securing an inherent part of the effective operation of the system.

⁴² Contouris N *et al* 'The future of remote work' (2023) 135.

16. Remote workers should also have the benefit of a **right to disconnect** from their work and the right to refrain from 'engaging in work-related electronic communications, such as emails or other messages, during non-work hours' without fear of punitive measures against them.⁴³

(2.) Hours of work and the right to disconnect

17. The Basic Conditions of Employment Act, 1997 (BCEA) regulates minimum conditions of employment including the **regulation of working time** including ordinary hours of work and maximum weekly and daily hours, rest periods, breaks during the working day and maximum overtime hours. Section 7 of the BCEA requires an employer to regulate working time in accordance with legislation regulating health and safety giving due regard to the employees' safety and health, the Code of Good Practice on the Regulation of Working Time (Working Time Code), and the employees' family responsibilities.
18. The Working Time Code was developed to be read in conjunction with the provisions on working hours in the BCEA and 'gives considerable guidance to employers regarding practical matters around working hours'.⁴⁴ The BCEA and Code of Good Practice aim to ensure that there is a balance between worker protection (in order to prevent exhausting work hours) and allowing employees to have sufficient rest periods.⁴⁵ Working hours which include ordinary hours of work and overtime are regulated by chapter 2 of the BCEA.⁴⁶
19. The regulation of working hours is important in the context of remote work,⁴⁷ as many employees are unable to detach or disconnect from work and employees are tacitly expected to be always available.⁴⁸ Moreover, the absence of a commute has blurred the lines between working time and after-hours.⁴⁹ Consequently, remote employees work long and intense hours

⁴³ For example, Belgium passed a law protecting civil servants from punishment for disengaging from work emails, texts and phone calls that they received after working hours. Other countries that have passed legislation to protect the right to disengage include Portugal, France, Chile and Ireland Sibanda OS '[Why remote employees should have the right to disconnect after working hours](#)' Daily Maverick 5 February 2023.

⁴⁴ Code of Good Practice on the Arrangement of Working Time in GN R1440 in GG 19453 of 13 November 1998, 3.

⁴⁵ Godfrey S & Clarke M 'The Basic Conditions of Employment Act amendments: More questions than answers' (2002) 6 *Law, Democracy & Development* 1

⁴⁶ **Section 9 of the BCEA** sets maximum weekly ordinary hours of work at 45 hours, which translates into maximum daily ordinary hours of work of 9 hours (if working a 5-day week) or 8 hours (if working more than 5 days per week). **Section 10** of the BCEA sets the maximum weekly overtime hours at 10 hours, and maximum daily hours cannot exceed 12 hours (actual maximum overtime hours will therefore vary according to the ordinary hours in the workplace). **Section 10(6)** provides that overtime can be increased to a maximum of 15 hours weekly by a collective agreement. However, this may not apply for more than two months within any 12-month period. Section 10 (2&3) regulates the payment of overtime benefits to workers. In addition, section 14(1) of the BCEA grants an employee who has worked continuously for more than 5 hours, a meal break of at least one continuous hour. This may be varied by a written agreement. Also, section 14(2) prohibits employees working during their meal interval unless the employee's duties cannot be left unattended. Similarly, section 15 provides employees must be granted at least 12 hours daily rest periods and at least 36 consecutive hours of weekly rest periods.

⁴⁷ Many remote employees work on average more than 45 hours weekly as well as work on weekends. See Bolisani E 'Working from home during COVID-19 pandemic: lessons learned and issues' (2020) 15 *Management and Marketing* 472.

⁴⁸ Yang L et al 'The effects of remote work on collaboration among information workers' (2022) 6 *Nature Human Behaviour* 46; Jessica James *Remote working and labour legislation in South Africa* (2022) Unpublished LLM thesis, university of the Western Cape.

⁴⁹ Davis Sr, Wayne A. *The use of mobile communication technology after hours and its effects on work life*

which violate the minimum standards provided in the BCEA. Longer working hours have caused significant negative impacts such as disruption of family life, damage to employee mental and physical health and more recently, the great resignation experienced in many countries, including in South Africa.⁵⁰

20. The statutory protections for hours of work are more difficult to enforce in the context of remote work, particularly when faced with unrealistic demands or expectations, and the role of management is important in avoid overwork and erratic work routines. There should be effective communication of realistic expectations and deadlines that maintain the required level of performance, and considerations for adjusting remote work in terms of workload, deadlines, and tasks.⁵¹ Employers should consider asking employees to develop workplans, for discussion with their supervisors, which should complement existing procedures.⁵²
21. As a form of regulation, the **Working Time Code** provides important guidance for shaping aspects of the regulation of remote work. The norms in item 2.2 include consideration of health and safety and family responsibilities, and, in the context of health and safety, key aspects are raised in item 3, including: the requirement for employers to conduct risk assessments; implement appropriate measures to eliminate hazards identified; and train employees about the risks to their health and safety and measures to control such risks. The focus on working hours allows for a line to be drawn between personal life and working time and addresses the challenge of remote workers being available at all times as a result of the access and connectivity provided by technology.⁵³
22. The **right to disconnect** is described as ‘the right that [grants] workers the possibility of remaining inaccessible or of not being contacted by any means through digital or other devices for matters related to their work performance, whenever they are out of their work times, that is to say, in their breaks during the workday, daily, weekly and annual rest periods, work leaves, holidays, among others’.⁵⁴

balance and organizational efficiency. Capella University, 2016; Von Bergen, Clarence W., and Martin S. Bressler. "Work, non-work boundaries and the right to disconnect." *The journal of applied business and economics* 21.2 (2019): 51-69.

⁵⁰ Chugh A [‘What is ‘The Great Resignation’? An expert explains’](#); Liu J [‘A record 4.4 million people quit in September as Great Resignation shows no signs of stopping’](#); and Fokazi S [‘Global ‘great resignation’ trend seen in SA as long working hours in pandemic rattle employees’](#).

⁵¹ Messenger J *et al* ‘Teleworking during the COVID-19 pandemic and beyond: A Practical Guide’ (2020) 6.

⁵² Messenger J *et al* ‘Teleworking during the COVID-19 pandemic and beyond: A Practical Guide’ (2020) 6.

⁵³ Teleworking during the COVID-19 pandemic and beyond A practical guide Geneva: International Labour Office, July 2020.

⁵⁴ Chiuffo FM ‘The “Right to Disconnect” or “How to Pull the Plug on Work”’ (2019) 4 SSRN Electronic Journal 12.

23. While the **right to disconnect**, is not explicitly recognised in South African law,⁵⁵ there is general support for the development of such a right,⁵⁶ which would align with developments abroad,⁵⁷ and would promote compliance with international law standards.⁵⁸

(3.) *Non-discrimination and the right to equal treatment and protection from harassment*

24. In terms of the Employment Equity Act (EEA), employers may not discriminate between employees in any policy or practice,⁵⁹ which could protect remote workers from unequal and prejudicial treatment in relation to their counterparts working at the employer's premises (although the EEA does require a ground to be alleged and in the absence of a listed ground, remote workers as a category of workers would be considered an arbitrary ground). Remote workers have the right to fair labour practices and should have equal career opportunities and opportunities for training etc,⁶⁰ and should not be prejudiced for exercising the right to disconnect.
25. Also relevant to remote work is the problem of harassment in the workplace. Section 6(3) prohibits the harassment of an employee on any or a combination of the grounds of unfair discrimination. Besides the EEA, harassment in the workplace is dealt with in terms of the 2022 Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (Harassment Code), which gives effect to South Africa's obligations under the International Labour Organization's Violence and Harassment Convention, 2019 (No. 190). Item 4.1 of the Code describes harassment as –

4.1.1 unwanted conduct which impairs dignity;

⁵⁵ Although the right to disengage is implied in terms of the contract of employment and provisions of the BCEA.

⁵⁶ See Rammila D '[Teleworking in South Africa: Laws and Challenges in an Unequal Society](#)' (2023); and see Professor Letlhokwa George Mpedi, [The way we work is evolving quickly and legislation must evolve accordingly](#) and [Beware the ethical and legal considerations of using wearables in the workplace](#) (2023) Daily Maverick; Marthinus van Staden [The digital ties that bind – South Africans need the right to disconnect and slip the work leash](#) (2021) Daily Maverick.

⁵⁷ See for example the Irish Workplace Relations Commission's Code of Good Practice for Employers and Employees on the Right to Disconnect. Kenya has also recently taken steps towards protecting the right to disengage of employees in the Kenyan Employee (Amendment) Bill 2022, which, if enacted will prevent employers expecting employees to answer calls, texts, or emails outside working hours or during public holidays and weekends.⁵⁷ Article 27A (1) of the Bill provides that 'an employee has the right to disconnect from their employer', and, in terms of Article 17A(7), if an employer contacts an employee outside of mutually agreed working hours, the employee is not obliged to respond and has the right to disconnect, or may choose to respond and be entitled to compensation. The Bill further says that employees shall not be reprimanded or punished if they do not respond to work-related communications outside of their agreed upon working hours, failing which the employer may face fines or imprisonment. Article 27A (5) further elaborates that the right to disengage may only be limited to address a work-related emergency which falls within the employee's responsibility. Sibanda OS '[Why remote employees should have the right to disconnect after working hours](#)' (2023).

⁵⁸ Including the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) which recognizes the right of every person to '[r]est, leisure and reasonable limitation of working hours and periodic holidays with pay' (Article 7(d)).

⁵⁹ Which includes job classifications and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, recruitment procedures, advertisements and selection criteria, training and development, promotion, demotion and disciplinary measures short of dismissal. (Section 1 of the EEA).

⁶⁰ Contouris N *et al* 'The future of remote work' (2023) 134.

- 4.1.2 which creates a hostile or intimidating work environment for one or more employees or is calculated to, or has the effect of, inducing submission by actual or threatened adverse consequences; and
- 4.1.3 is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the EEA. Harassment includes violence, physical abuse, psychological abuse, emotional abuse, sexual abuse, and racial abuse. It includes the use of physical force or power, whether threatened or actual, against another person or against a group or community.
26. The Code requires employers to ensure employees are protected against third party harassment, and s. 60 of the EEA indicates the circumstances in which an employer will be liable when an employee experiences discrimination or harassment. The Code requires employers to adopt measures to prevent violence and harassment including creating implementing effective complaint procedures and ensuring access to remedies, among others. Employers will be liable if they ought to have anticipated harassment and did not take proactive steps.
27. Item 2.3 of the Code provides a non-exhaustive list of working situations where employees will be protected against harassment. These include both public and private spaces where people carry out their work, as well as work-related communications, including ICT and internet-enabled communications. This is important for remote employees, particularly for women.⁶¹ Item 2.3.8 explicitly states that the Code will be applicable ‘in the case of employees who work virtually from their homes, or any place other than the employer’s premises, the location where they are working constitutes the workplace’. This recognition of remote workspaces has implications for the protection against harassment of remote employees. Moreover, the Code provides an extensive list of various types of harassment in item 4.7, including ‘surveillance of an employee without their knowledge and with harmful intent’.
28. In the context of remote work, there are **risks factors** that enable harassment in the workplace, and its isolated nature could enable the perpetration of harassment and reduce the likelihood of others witnessing this misconduct. Moreover, the increased **risk of domestic violence** (as was seen during the Covid-19 pandemic), and the impact of domestic violence should inform developments, which should take into account ILO standards⁶² in this regard.⁶³
29. Violence and harassment are recognised as health and safety concerns. Other health and safety challenges in the context of remote work include ergonomic and psychosocial risks, with remote work being linked to higher anxiety levels in remote workers.⁶⁴

⁶¹ Research shows that online harassment became more prevalent during the COVID-19 pandemic as more workers worked from home. UN Women [‘Online and ICT facilitated violence against women and girls during COVID-19’](#)

⁶² Convention 190, which South Africa ratified in 2021, and the Violence and Harassment Recommendation, 2019 (No 206).

⁶³ Convention 190 recognises more broadly the impact of domestic violence in the world of work and provides for measures that ‘so far as is reasonably practicable, mitigate its impact in the world of work’ (Article 10(f) of C 190), which would include ‘legislation recognising the obligations of employers not to discriminate or retaliate against employees who are survivors of domestic violence, and to affirmatively provide paid and unpaid leave from work to address the impact of victimization on their lives without the fear of job loss’. Runge ‘What a Feminist International Labor Standard Can Teach the U.S’ p. 460. Examples include the Domestic Violence – Victims’ Protection Act 21 of 2018 in New Zealand.

⁶⁴ Messenger J *et al* ‘Teleworking during the COVID-19 pandemic and beyond: A Practical Guide’ (2020) 12.

(4.) Occupational health and safety concerns and workers' compensation

30. The Occupational Health and Safety Act, 1993 (OHSA) regulates health and safety in South African workplaces (the mining sector is separately regulated by the Mine Health and Safety Act). OHSA applies to all employment activities and all instances where machinery is used. The scope of the OHSA is broadly defined, and an employer's obligation extends to non-employees. In addition, the OHSA conceives workplace to mean '**any premises or place where a person performs work in the course of his employment**'. This would include premises where remote workers perform work including the employee's home. The OHS duties placed on employers of remote employees include the general duty to ensure employees work in a **safe and healthy work environment as far as reasonably practicable**. The duty is **preventative** in nature as it aims to prevent accidents/injuries in the workplace. Section 8(2)(d) requires employers to have knowledge of the hazards within the workplace, and to establish cautionary measures to protect health and safety. Employers are obliged to provide necessary **information, instructions, training, and supervision** to employees and enforce measures as may be necessary in the interest of health and safety among others. In addition, employers must ensure that work is performed, and that plant or machinery is used, under the general supervision of a person trained to understand the hazards associated with it and who have the authority.
31. **Regulations** form part of the framework of the OHSA and provide detailed standards for employers in addressing risk assessment. One such regulation is the **Ergonomic Regulations, 2019** which apply to any employer or self-employed person who carries out work at a workplace which may expose people to ergonomic risks. Regulation 1 defines ergonomic risk as 'a characteristic or action in the workplace, workplace conditions, or a combination thereof that may impair overall system performance and human well-being'. For remote workers, ergonomic risk factors which affect their well-being include awkward posture, repetitive motion, poor workstation, environmental factors (such as room temperature and lighting) and psychosocial factors such as isolation.⁶⁵ Employers in consultation with health and safety committees are required to conduct ergonomics risks assessment and expose employees to ergonomic risks training.
32. Remote work raises challenges for implementation of the employers' obligations to conduct risk assessments and put in place adequate precautionary measures.⁶⁶ Even if OHS experts can access employees' premises, accessing the premises of each employee is not reasonably practicable. Furthermore, an employee's home as the workplace raises privacy considerations. That being said, employers remain responsible for identifying and managing occupational risks, and should inform remote workers about important ergonomics issues, including through training, and guidance on the health and safety risks and hazards, stress and other mental health issues related to remote work;⁶⁷ and on the technical aspects of remote work environments,

⁶⁵ Wodajeneh SN et al 'Ergonomic risk factors analysis in remote workplace' (2023) 24 *Theoretical Issues in Ergonomics Science* 681-697.

⁶⁶ Matisane L et al 'Challenges for Workplace Risk Assessment in Home Offices-Results from a Qualitative Descriptive Study on Working Life during the First Wave of the COVID Pandemic in Latvia' (2021) 18 *Int. J. Environ. Res. Public Health* 3.

⁶⁷ Yet, without proper ergonomics and risk assessments, remote employees are prone to developing diseases and injuries such as **musculoskeletal damage, eye strain and stress** among others. See, Larrea-Araujo, César, et al. "Ergonomic risk factors of teleworking in Ecuador during the COVID-19 pandemic: A cross-sectional study." *International Journal of Environmental research and public health* 18.10 (2021): 5063; Korhan, Orhan, and Adham Mackieh. "A model for occupational injury risk assessment of musculoskeletal discomfort and their

equipment (while encouraging use of equipment from the office) and ergonomics of the home office.⁶⁸ Rights and responsibilities in terms of health and safety should be clarified, and managers and remote workers should receive training on the importance of adequate breaks.⁶⁹ As mentioned, violence and harassment (including bullying) are a health and safety risk, and should similarly be assessed and managed as such.

33. OHSA (s. 9) provides that the employer must ensure, to the extent that is **reasonably practicable**, the health and safety of *everyone* who may be directly affected by their activities. The phrase **reasonably practicable** is defined in section 1(1) to mean having regard to –
- a) The severity and scope of the hazard or risk concerned.
 - b) Knowledge reasonably available concerning the hazard or risk and any means of preventing same.
 - c) Availability and suitability of means to remove or mitigate that hazard or risk.
 - d) The cost of removing or mitigating the hazard or risk relative to the benefits derived.
34. **Employees** are required to take reasonable care for the health and safety of themselves and other persons who may be affected by their conduct. Section 14(b) expressly obliges employees to comply with all health and safety rules and instructions issued by their employers and to assist employers to comply with their statutory health and safety obligations. In the context of remote work, employers can provide employees with information and instructions around health and safety issues like ergonomics. However, verifying compliance with such information/instructions remains an implementation challenge.⁷⁰
35. Despite the measures of the OHSA as a safeguard to protect health and safety in the workplace, **occupational injuries and diseases** still occur and compensation for loss of income arising from such injuries and diseases is regulated by the Compensation for Occupational Injuries and Diseases Act (COIDA). In terms of COIDA, an employee is entitled to compensation for injuries, diseases, or death (compensation paid out to the employee's dependents) that arise out of or in the course of employment. On the scope of COIDA, section 1 defines an employee as a person who has entered into or work under contracts of service, apprenticeships or learnership with an employer and who is remunerated for that work in cash or in for kind.⁷¹ However, independent contractors, persons performing military service, members of the permanent force of the National Defence Force and South African Police Service are not employees within the meaning of the COIDA.

frequencies in computer users." *Safety Science* 48.7 (2010): 868-877.

⁶⁸ Messenger J *et al* 'Teleworking during the COVID-19 pandemic and beyond: A Practical Guide' (2020) 14.

⁶⁹ Messenger J *et al* 'Teleworking during the COVID-19 pandemic and beyond: A Practical Guide' (2020) 14.

⁷⁰ A key part of enforcing the provisions of the OHSA is through **self-regulation**, as well as health and safety representatives, where applicable. Section 71 requires employers with more than 20 employees to appoint health and safety representatives and one representative for every 50 employees. The general duties of these representatives include evaluating existing health and safety measures; identifying potential hazards/risks and major incidents in the workplace; investigating health and safety complaints and inspecting the workplace, among other functions. Related to this, is the role of labour inspectorate to ensure compliance with OHSA and its regulations, including the inspection of workplaces and premises where machinery is used; and to conduct investigations into hazardous incidents in the workplace.

⁷¹ This includes casual employees, directors or members of body corporate who have contracts of service, employees provided by labour brokers for clients.

36. COIDA defines an occupational disease as a disease, mentioned in Schedule 3, arising out of and in the course of an employee's employment and includes different categories of diseases including diseases caused by occupational musculo-skeletal disorders. Section 22 makes provision for occupational injuries if they are a consequence of an accident. The Act defines an accident as 'an incident or occurrence arising out of and in the course of an employee's employment and resulting in a personal injury, illness, occupational disease or the death of the employee'.⁷² This gives rise to the question as to the circumstances in which accidents in the context of remote work will be considered to have arisen out of and in the course of employment (for example accidents that might occur while working remotely in an internet café), and the circumstances in which a claim for compensation may be submitted in terms of COIDA. In the context of diseases, section 65(1)(b) leaves room for other diseases which are not specifically mentioned in schedule 3 but arise out of and in the course of employment. Prof Calitz makes the argument for burnout – chronic workplace stress – to be recognised as a distinguishable disease in South Africa; and for amendment to the OHS Act to require psychosocial risk assessments and measures to address these risks; and that the Unemployment Insurance Act 2001 (UIA) provide for extended sick leave for burnout; and that COIDA be amended with provision for burnout to be included as a compensable disease, with provision for psychotherapy, rehabilitation, and reintegration of employees in the workplace.⁷³
37. Because of the flexibility of remote work, some workers may also work remotely in jurisdictions outside of the place of their employment. In this regard, s. 23 extends the scope of COIDA to employees who are temporarily outside South Africa (but are employed in South Africa), limited to 12 months of continuously working outside of the country. (Depending on where a remote worker resides, he or she may in any event be covered by a workers' compensation scheme in the country where they are residing).

PART C. CONSIDERATIONS FOR A CONSOLIDATED CODE OF GOOD PRACTICE

38. There have been suggestions for clarifying remote work in the context of labour law, and proposals to improve protection for remote workers, including the introduction of a right to disconnect.⁷⁴ The current regulatory framework (LRA, BCEA, EEA, OHS Act, and COIDA) and related instruments, including Regulations and Codes of Good Practice already provide a substantive body of principles that apply in the context of remote work. However, these need clarification and development in relation to their application to remote work. In this regard, introducing a Code of Good Practice for Remote Work would be a significant step towards addressing the concerns that arise in the context of remote work, and could clarify the right to disconnect, consistent with the provisions of the BCEA and the regulation of working time, as well as the health and safety concerns, including application of the ergonomics regulation, 2019 issued in

⁷² An amendment to the Act has been passed (Act 10 of 2022) but has not yet promulgated: the underlined words have been added by the amendment and the crossed through words have been deleted.

⁷³ See Karin Calitz, '[Burnout in the workplace](#)' *Obiter* 2020.

⁷⁴ As mentioned, see Rammila D '[Teleworking in South Africa: Laws and Challenges in an Unequal Society](#)' (2023); Prof. Letlhokwa George Mpedi, '[The way we work is evolving quickly and legislation must evolve accordingly](#)' and '[Beware the ethical and legal considerations of using wearables in the workplace](#)' (2023) Daily Maverick; Marthinus van Staden '[The digital ties that bind – South Africans need the right to disconnect and slip the work leash](#)' (2021) Daily Maverick; and Sibanda OS '[Why remote employees should have the right to disconnect after working hours](#)' Daily Maverick 5 February 2023; and JA James, 'Remote working and labour legislation in South Africa', LLM research paper, University of the Western Cape (December 2022).

terms of OHSa in the context of remote work. In the context of the public sector, there may be additional considerations, and in this regard the [Report on the Impact of Hybrid Work Arrangements](#), should also be taken.

39. **Employment law** is broadly defined (**LRA s. 213**) to include, among others, the LRA, the EA, OHSa, COIDA, and 'any other Act the administration of which has been assigned to the Minister', and **LRA s. 203** empowers NEDLAC to prepare and issue codes of good practice, which (**LRA s. 203(4)**) 'must be taken into account **in applying or interpreting any employment law.**' Hence it would appear competent for NEDLAC, or the Minister (s. 203 (2A)), to issue a Code of Conduct for Remote Work based on the provisions and principles in the LRA, BCEA, EEA, OHSa and COIDA and related codes and regulations. It would make sense to draw from the different statutes and their frameworks, and to incorporate the principles and guidelines from employment law into a comprehensive framework for remote work. (Alternative approaches to this could include regulating remote work by amending existing statutes (introducing new provisions), regulations and/or Codes of Good Practice; or a combination of statutory amendments and a consolidated Code).
40. The concerns and guidelines, and related content, that should be in considered for including in a consolidated Code are listed and briefly discussed below.

[1] **Definitions and remote work in context, and general rights and responsibilities**

41. The Code should clarify the meaning of remote work⁷⁵ and the essential features of remote works (eg. working outside the workplace in any suitable place, or in limited places, and the use of information and communication technology for carrying out work, and availability of online connection with the employer);⁷⁶ and should provide an overview of the sources of law that determine the responsibilities and rights of the parties in the context of remote work.
42. The meaning of employee should be clarified, and definitions of remote work and workplace could be considered, taking into account the objective of the definitions in the context of the Code. Other relevant definitions could include those related to ergonomics and health and safety risks.
- **Employee** to include a remote worker
 - **Workplace** to include any public or private space agreed upon by the employee in consultation with the employer where employees perform their work; , including virtual workspaces
 - **Remote work** means telework, virtual work, telecommuting where the working activity is performed outside the employer's premises using information and communication technology on a regular basis

⁷⁵ Clarifying that remote work is not a new form of work but rather a way of performing subordinate work outside the employer's premise using ICT.

⁷⁶ As well as hybrid arrangements and alternating remote work with work at the employer's premises.

[2] Written particulars of employment

43. **Section 29 of the BCEA** indicates **written particulars of employment** that an employer must supply to an employee on commencement of employment, and the code should elaborate on the information that is required in the written particulars of employment in relation to remote work, which could include details relating to –

- Parties' obligations
- Hours of work and the right to disconnect and the use of work communication systems afterhours
- Location where work will be performed
- Description and any restrictions and responsibilities regarding equipment, communication systems, confidentiality and data security, monitoring, and surveillance and privacy protection
- Provision of tools and equipment and reimbursement for work-related expenses
- Criteria for determining performance
- Procedures for requesting, and reversing, remote working arrangements; and procedures for dealing with OSH matters or risks

[3] Clarifying hours of work and the right to disconnect

44. Although not explicitly included as a right in the law, the right to disconnect is implicit in the regulation of hours of work and as an aspect of occupational health and safety.⁷⁷ The regulatory framework for remote work should also provide scope for variation (consistent with the BCEA framework) in terms of its application to certain sectors and industries,⁷⁸ which could be achieved through consultation or collective bargaining processes. The code could suggest the development of workplace policies that address the following -

- a) Explain the right to disconnect in relation to hours of work and the categories of workers to whom the right applies;
- b) Clarifying exceptional circumstances for deviating from the right, during which employees may be expected to respond to communications and engage on matters of urgency;
- c) Clarifying the use of electronic devices to send or receive work-related communications outside work hours;
- d) Clarify the circumstances in which employees who work outside working hours will be compensated, and the nature of the compensation, which could include time off and flexibility to adjust working arrangements; and
- e) Monitoring and enforcement, and the consultation processes applicable to the right to disconnect.

⁷⁷ The right to disconnect (from work-related communications and activities) may be clarified directly in statute (the BCEA).

⁷⁸ For example, the right to disconnect in Belgium was initially applied to only public-sector employees. In 2022, it was extended to employers in the private sector with 20 employees or more. Ward Boucique & Ester Vets '[The right to disconnect: which countries have legislated?](#)'

[4] Regulating occupational health and safety concerns

45. The health and safety challenges of remote work should be included in the Code, with guidance on the regulatory framework and on implementation of the Ergonomics Regulations, 2019 specifically in the context of remote work, including guidelines on risk assessment and factors that could cause injuries while working remotely, and as relevant, safety checks, requirements for regular training on health and safety and ergonomics risks.
46. The code should clarify the psychosocial risks associated with remote work, and the risks related to violence and harassment.⁷⁹ The processes and support for remote workers should be clarified and guidance on the law (OHS, COIDA, EEA and EEA Codes of Good Practice) should be provided. Moreover, employers should be encouraged to develop workplace policies aligned with the provisions of ILO standards for violence and harassment (Convention 190 and Recommendation 206), including a right to request flexible work arrangements and unpaid leave.

[5] Remote work arrangements, obligations, and employee protections

47. Important considerations regarding remote work arrangements include the employee's right to fair labour practices and protection from discrimination, which should be explained in the code, with illustrations of how the principles apply in remote work contexts.
48. Policies and practices for performance evaluation, the provision and use of equipment and communication systems,⁸⁰ and monitoring and surveillance, and privacy, should be addressed in the code, with guidance on developing the relevant policies and rules in the workplace, in consultation with workers (see [6.] below), and clarity should be provided in relation to compliance and enforcement in the event of transgressions (see [7.] below).
49. The lack of clarity on who bears the burden of work-related costs⁸¹ (including insurance coverage in relation to tools of the trade) in the context of remote work should be addressed in the code and in workplace policies.

[6] Collective bargaining as a mechanism to regulate remote work

50. As mentioned, arrangements for remote work should be based on consensus or collective bargaining between the parties, whether at the workplace level, sectoral level, or in the setting of standards at national level.⁸²

⁷⁹ Recognising that isolation is a risk of remote work which can result in psychological challenges, including depression, and, moreover that the circumstances of some workers, particularly women, include family responsibilities, and that exposure to domestic violence could have implications in the workplace.

⁸⁰ Mpedi LG 'The way we work is evolving quickly and legislation must evolve accordingly' Daily Maverick 26 July 2023 available at <https://www.dailymaverick.co.za/opinionista/2023-07-26-workingg-remotely-legislation-must-evolve-accordingly/> (accessed 16 September 2023).

⁸¹ As mentioned, this could include direct costs associated with remote work, but in addition the possibility of paying 'double tax' when a remote worker is based in a country other than the country in which the premises of the employer are situated. Clarity should be provided and in addition tax measures could be considered if necessary. Messenger J *et al* 'Teleworking during the COVID-19 pandemic and beyond: A Practical Guide' (2020) 23.

⁸² See for example the Angola teleworking legislation (Presidential Decree No. 52/22) requiring written agreement; and the right to request remote work in the Australian Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (s. 65A Responding to requests for flexible working arrangements).

51. Interesting developments in the context of collective bargaining that social partners could consider include the social partner [framework agreements](#), declarations and guidelines⁸³ that impact on the regulation remote work. Other developments that enable collective bargaining include the recent [changes to Belgium's labour law in 2022](#) which provides for the development of company policy / work rules (including the modalities on the right to disconnect) by way of collective agreement.

[7] Compliance and enforcement mechanisms

Finally, the Code should set out the processes for addressing concerns and disputes, including workplace processes as well as [the role of the labour inspectorate](#)⁸⁴ in terms of compliance and enforcement of obligations provided in the primary statutes, and the role of the CCMA or bargaining council in the resolution of labour disputes.

⁸³ See for example the [EU Telecom Social Partners' Guidelines on Remote Work](#).

⁸⁴ Noting also that in the context of OHSA, the [possibility for the chief inspector to exercise the power in section 7 of the OHSA, which could be used to direct employers to develop a written policy concerning the protection of the health and safety of remote employees. Compliance with such policies can be achieved by requiring employees to prepare documentation that shows how they are compliant.](#)

ANNEXURE A: THE WORKERS' RIGHTS ACT 2019 (Mauritius)

THE WORKERS' RIGHTS ACT 2019 (Mauritius)⁸⁵

Regulations made by the Minister under section 124 of the Workers' Rights Act 2019

1. These regulations may be cited as the Workers' Rights (Working from Home) Regulations 2020.
2. In these regulations – “Act” means the Workers' Rights Act 2019; “home”, in relation to a worker – (a) means the place of residence of the worker; and (b) includes such other place as may be agreed upon by the worker and his employer; “homeworker” means a worker who works from home; “work from home” includes – (a) work performed on full-time or part-time basis; (b) work performed on permanent, temporary or occasional basis; (c) work split between home, office or place of business of the client; (d) work performed on an hourly rate, a weekly rate, a fortnightly rate, a monthly rate, piece rate or task basis; (e) work performed through – (i) teleworking; (ii) online platform; (iii) any other form or nature of work, whether performed through electronic device, IT system or not.
3. Where a worker is in the employment of an employer – (a) the employer may require that worker to work from home provided a notice of at least 48 hours is given to the worker and the worker shall comply accordingly; or (b) the worker may make a request to the employer to work from home and the employer may accede to the request.
4. (1) Where the worker is required to work from home or where his request to work from home is acceded to, under regulation 3, the worker shall inform his employer of the proposed place where work is to be performed. (2) The employer shall, where appropriate, conduct a suitable and sufficient assessment at the proposed place of work to ensure that performance of work at the proposed place shall not entail any risk to the safety and health of the homeworker and members of his family.
5. Subject to regulation 6, where – (a) a worker is required to work from home; or (b) an employer accedes to the request of a worker to work from home, the worker and the employer shall enter into a Working From Home Agreement in the form set out in the First Schedule.
6. Where a worker and an employer have entered into a Working From Home Agreement, the employer may, subject to the operational requirements of his business, require the worker to work at his initial place of work.
7. (1) A homeworker shall be governed by the terms and conditions of employment specified in the Second Schedule. (2) For the avoidance of doubt, the general conditions of employment specified in the Act shall also apply to a homeworker.
8. Where an employer remunerates a worker in accordance with these regulations, he shall issue to that homeworker a payslip in the form set out in the Third Schedule.
9. Nothing in these regulations shall – (a) prevent an employer from – (i) remunerating a homeworker at a rate higher than that specified in the appropriate Remuneration Regulations or in the National Minimum Wage Regulations; (ii) providing the homeworker with conditions of employment more favourable than those specified in the First Schedule; (b) authorise an employer to – (i) reduce the wages of a homeworker; or (ii) subject to section 57 of the

⁸⁵ [The Workers' Rights Act 2019](#)

Employment Relations Act, alter the conditions of employment of a homeworker so as to make them less favourable.

10. Any agreement by a homeworker to relinquish his rights under these regulations shall be void.

11. These regulations shall be deemed to have come into operation on 1 September 2020.

Made by the Minister on 24 September 2020.

FIRST SCHEDULE

[Regulation 5]

WORKING FROM HOME AGREEMENT

This document constitutes an agreement between, hereinafter referred as the homeworker and, hereinafter referred as the employer.

Details of homeworker

Name National identity card no.
..... Residential address
..... Telephone no. Mobile no.
..... Email address

Duration of Agreement

(1) Indeterminate period Commencement date (2) Determinate period Commencement date Expiry date Position to be held by the worker Wages per week/fortnight/month
..... Agreed location to work from home
..... Assignment and schedule of work
.....

Terms and conditions

1. Hours of work

(1) The hours of work of a homeworker shall be within the normal working hours of the business of the employer or within the time frame agreed between the homeworker and his employer.

Hours of work

(2) The homeworker agrees to maintain and update a record of the number of hours and days that he works from home

2. Working tools and equipment

(1) The following installations, working tools and equipment shall be provided by the employer – SN, Quantity of item provided, Description of item and Serial/identification no.

(2) The working tools and equipment shall remain the property of the employer and shall be returned to the employer on request or on termination of the Working From Home Agreement.

(3) The homeworker shall use the working tools and equipment provided by the employer exclusively for official use.

(4) Where the homeworker is provided with any information technology (IT) equipment, he shall not install or download any software without the written approval of his employer.

(5) The homeworker shall take all reasonable precautions to maintain in good conditions all tools and equipment provided by his employer and any installation thereof.

(6) The employer shall, as agreed, provide the homeworker work-related consumable materials.

3. Communication

(1) The homeworker shall be available during such core working hours as may be agreed between the homeworker and his employer, for work-related communication, including receiving instructions, collecting and returning assignments and for reporting.

(2) Any change to the agreed schedule of work shall be discussed and approved in writing by the homeworker and his employer.

4. Performance

The employer and the homeworker shall establish and implement an appropriate procedure to monitor and assess work progress.

5. Confidentiality, data protection and intellectual property

(1) The homeworker shall not, except with the consent of his employer, divulge or use any confidential information obtained in the course of his work for any purpose other than work.

(2) The homeworker shall abide by his employer's policy and the Data Protection Act 2017 in respect of security of confidential information including, but not limited to, technical data, trade data, trade secrets, know-how and confidential information relating to the businesses, finances, accounts, dealings, transactions, methods of operation, assets or affairs of the employer, obtained during the course of his employment.

(3) The homeworker shall comply with laws regarding the protection of intellectual property rights, including – (a) the Patent, Industrial Designs and Trademark Act; (b) the Protection against Unfair Practices (Industrial Property Rights) Act; and (c) the Copyright Act.

(4) Any product invention or discovery made in the course of the employment of the homeworker shall be deemed to be the property of the employer.

6. Safety and health

The homeworker and his employer shall comply with the Occupational Safety and Health Act.

7. Acceptance

We have read and understood the terms and conditions specified in this contract and we accept these terms and conditions.

SECOND SCHEDULE

[Regulation 7]

1. Normal working hours

(1) Subject to subparagraph (2), no employer shall, except with the written consent of a homeworker, require the worker to work for more than 45 hours in a week in respect of work which is to be performed from Monday to Saturday.

(2) The hours of work of a homeworker – (a) shall not be less favourable than the hours of work prescribed in any Regulations or enactment or specified in an agreement, as the case may be, applicable to the trade or business in which the homeworker is in employment; or (b) shall, where the homeworker is required to work for lesser number of hours, be as agreed between the employer and the homeworker.

(3) Where a homeworker is required to work on flexitime – (a) the work allocated to him shall be performed and completed within a time frame to be agreed with his employer; (b) the homeworker shall be available during the core hours of work to be agreed with his employer for work-related communication.

(4) The hours of work of a homeworker shall include time spent – (a) to collect work and materials; (b) to deliver completed work; (c) waiting at home for working tools and equipment to be repaired or maintained; (d) waiting at home for work to be delivered or otherwise assigned; (e) waiting for instructions to be given over the phone or otherwise; (f) in attending meetings with the employer or his clients for business-related purpose.

(5) A homeworker shall, after completion of his normal day's work, be entitled to a rest period of not less than 11 consecutive hours before resuming work.

(6) A homeworker shall, in every working day, be entitled to an in-work rest break of one hour without pay, to be taken at his discretion where he performs not less than 4 consecutive hours of work.

2. Payment of remuneration

(1) An employer shall pay a homeworker – (a) wages at a rate which shall not be less than the rate specified in any enactment or agreement, as the case may be, applicable to the trade or business in which he is employed; (b) wages which shall not be less than that earned by a comparable worker who performs the same hours of work and the same or similar duties on the premises of his employer.

(2) Where an employer requires a homeworker to work on piece rate or task basis – (a) the task allocated shall be mutually agreed between the homeworker and the employer; (b) the homeworker shall be deemed to have performed a normal day's work if he completes the number of pieces or the task allotted to him before the end of his stipulated normal day's work.

3. Disturbance allowance for work performed during unsocial hours

(1) (a) Where a homeworker performs, with his consent, work during unsocial hours, he shall, in addition to any payment due under any enactment, be paid a disturbance allowance equivalent to one time his hourly basic wage for every hour of work performed during the unsocial hours. (b) In this paragraph – “unsocial hours” – (a) means hours of work performed – (i) between 1 p.m. on a Saturday and 6 a.m. the ensuing Monday; and (ii) between 10 p.m. on a weekday and 6 a.m. the ensuing day; but (b) does not include the working hours of a worker in the ICT-BPO sector whose working hours correspond to the working hours in the market country served.

4. Payment of work-related expenses

(1) Subject to subparagraph (2), an employer shall refund to a homeworker – (a) any costs incurred for the use of electricity, water, telecommunication or any other facility in connection with work performed at home; (b) expenses incurred for the maintenance of tools and equipment provided to the homeworker for the performance of his work; (c) the equivalent of the return bus fare for travelling – (i) to and from the employer’s business premises; (ii) to meet customers or any other persons in relation to his work; or (iii) for such other purpose, in relation to his work, as may be agreed with his employer; (d) such other expenses incurred as may be agreed between the homeworker and his employer; and (e) any other costs or expenses incurred in relation to his work.

(2) The employer and the worker shall agree on the amount to be refunded to the worker in respect of work-related expenses specified in subparagraph (1) and the refund shall be made on a monthly basis.

5. Access to place of work

Where a worker works from home, his employer may, with the authorisation of the homeworker and subject to prior notice, have access to the place where work is performed, at a reasonable time agreed between the homeworker and his employer to – (a) install, repair and maintain or retrieve any working tools and equipment provided by the employer; (b) deliver working materials or collect finished products; (c) carry out any risk assessment with respect to safety and health, where appropriate; or (d) undertake such periodic safety and health inspections as may be required.

6. Injury at work

(1) Where a homeworker sustains any work-related injury out of and in the course of employment, he shall, as soon as reasonable and practicable, notify his employer of the injury.

(2) Subject to any other enactment, work-related injury sustained pursuant to subparagraph (1) shall be deemed to be injury at work.

Canada as an example of the inclusion of risk factors that enable violence and harassment in the workplace into regulation.

Section 8 of the 2020 Work Place Harassment and Violence Prevention Regulations states:

“An employer and the applicable partner must jointly identify the risk factors, internal and external to the work place, that contribute to harassment and violence in the work place, taking into account

- **(a)** the culture, conditions, activities and organizational structure of the work place;
- **(b)** circumstances external to the work place, such as family violence, that could give rise to harassment and violence in the work place;

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- **(c)** any reports, records and data that are related to harassment and violence in the work place;
- **(d)** the physical design of the work place; and
- **(e)** the measures that are in place to protect psychological health and safety in the work place”.⁸⁶

⁸⁶ <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2020-130/page-1.html>